Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 January 2015

Public Authority: London Borough of Lambeth
Address: Brixton Hill
Lambeth
London
SW2 1RW

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence relating to the development of a particular property, Keybridge House, as well as information regarding plans proposed by Transport for London (TfL) for the Kennington Green and Kennington Park sites. The London Borough of Lambeth (the Council) considered that the task of complying with the requests meant they were manifestly unreasonable and therefore engaged the regulation 12(4)(b) exception in the EIR. With regard to the public interest test, the Council found that the balance of the public interest favoured maintaining the exception because of the resources that would need to be expended on complying with the requests.

2. The Commissioner's decision is that the Council has failed to support the application of regulation 12(4)(b) of the EIR. He therefore requires the Council to issue a fresh response to the requests in accordance with the EIR that does not make reference to this exception.

3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 13 January 2014 the complainant wrote to the Council and asked for the following information:

> *1) the very same material that* [a specified party] *has asked for in relation to Keybridge House; and*
>
> *2) the records of meetings, discussion and all email and other correspondence that has passed between Lambeth Council and the proposed developers and between Council Officers for the period between September 2012 to date that relates to the development of Keybridge House.*
>
> *3) all correspondence, records of meetings and discussions that have been held or undertaken within Lambeth Council and between Council and TfL regarding the transfer to TfL of the sites they wish to use at Kennington Green and Kennington Park; and*
>
> *4) the documents that show how Lambeth Council arrived at the figures they have used to determine the cost that TfL should pay for the use of Kennington Green and Kennington Park*

5. The following day the Council acknowledged receipt of the requests and confirmed its intention to respond by 10 February 2014.

6. The complainant wrote to the Council on 12 March 2014 to highlight that a reply to the requests had not been received and the Council was asked to ensure that one was provided within five working days. This period elapsed without further contact from the Council and on 27 March 2014 the complainant notified the Commissioner of the Council's failure to respond.

7. Following the involvement of the Commissioner, the Council provided its substantive response to the requests on 29 May 2014. This stated that the requests were being considered under the EIR. With regard to request 1, the Council claimed that the commercial or industrial confidentiality exception (regulation 12(5)(e)) applied to information contained within the financial viability assessment. It did though enclose a non-technical summary of the financial viability assessment. In relation to requests 2, 3 and 4, the Council found that the total time required to respond meant that the requests for information were manifestly unreasonable and therefore engaged regulation 12(4)(b) of the EIR.

8. On 9 June 2014 the complainant provided the Commissioner with reasons that explained why they were unhappy with the Council's

response. In light of the complainant's dissatisfaction, the Commissioner returned to the Council the next day and asked it to reconsider its position on the requests; in effect, asking the Council to complete an internal review.

9. The Council informed the complainant on 10 June 2014 of its intention to carry out an internal review. In order to assist with this process, the Council asked for some further clarification on the scope of the information required. The complainant responded to the Council later the same day. This confirmed that request 1 could be excluded from the internal review.

10. The Council provided the outcome of its internal review on 1 August 2014. This upheld the reliance on regulation 12(4)(b) of the EIR to refuse the requests. With regard to requests 3 and 4, it also introduced the internal communications (regulation 12(4)(e)) and the commercial or industrial confidentiality (regulation 12(5)(e)) of the EIR as additional grounds for withholding parts of the requested information.

Scope of the case

11. The complainant contacted the Commissioner to complain about the Council's decision to refuse to comply with requests 2, 3 and 4 specified above.

12. The Commissioner's decision in this notice relates solely to whether the Council properly relied on the manifestly unreasonable exception (regulation 12(4)(b)) in the EIR to refuse the requests.

Reasons for decision

Regulation 12(4)(b) – manifestly unreasonable

13. Regulation 12(4)(b) of the EIR provides that a public authority may refuse to disclose information to the extent that the request for information is manifestly unreasonable. For information to be withheld under the exception, the request must meet a more stringent test than simply being "unreasonable". Rather, the use of the term "manifestly" to qualify the exception means that there must be an obvious or tangible quality to the unreasonableness.

14. The purpose of the exception is to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation, in handling an information request. The

Commissioner accepts that the exception will normally be used in one of two ways: to refuse a request that is vexatious; or to refuse a request because the cost of compliance is too great. In this case the Council has argued the latter point, namely that meeting the full terms of the request would place an unjustifiable demand on its resources.

15. In his guidance[1] on the exception, the Commissioner says at paragraph 19 that in assessing whether the cost or burden of dealing with a request is "too great", public authorities will need to consider the proportionality of the burden or costs involved and decide whether they are clearly or obviously unreasonable. The Commissioner considered this will mean taking into account all the circumstances of the case, including:

- the nature of the request and any wider value in the requested information being made publicly available;
- the importance of any underlying issue to which the request relates, and the extent to which responding to the request would illuminate that issue.
- the size of the public authority and the resources available to it, including the extent to which the public authority would be distracted from delivering other services; and
- the context in which the request is made, which may include the burden of responding to other requests on the same subject from the same requester.

16. A public authority must interpret restrictively the exceptions in the EIR and may be required to accept a greater burden in providing environmental information than other information. Where it is found to be engaged, regulation 12(4)(b) of the EIR is also qualified by the public interest test. Any exercise carried out to determine whether an exception applies must take into account the EIR's express presumption in favour of disclosure under regulation 12(2).

17. The considerations associated with the application of regulation 12(4)(b) of the EIR on the grounds of cost are broader than its closest relative in FOIA, section 12, which explicitly permits a public authority to refuse a request purely on the basis of the time and cost implications of

[1] https://ico.org.uk/media/for-organisations/documents/1615/manifestly-unreasonable-requests.pdf

compliance. While recognising the differences between section 12 of FOIA and regulation 12(4)(b), however, the Commissioner considers that the "appropriate limit" in section 12 may serve as a useful guide when considering whether a request is manifestly unreasonable on the basis of costs. This is because the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations), which have the effect of prescribing the "appropriate limit", is taken to give a clear indication of what Parliament considered to be a reasonable charge for staff time.

18. The Fees Regulations state that a public authority's estimate that compliance would exceed the appropriate limit can only take into account the costs a public authority reasonably expects to incur in: determining whether it holds the requested information; locating the information; retrieving the information; and, extracting the information. The Fees Regulations confirm that the costs associated with these activities should be worked out at a standard rate of £25 per hour per person. For local authorities the appropriate limit is set at £450, which is the equivalent of 18 hours work.

19. With reference to request 2, the Council initially estimated that 1500 emails would potentially be captured by the request. Taking one minute to access each of the emails and identify whether the information was within scope, it was calculated that complying with this part of the request would take approximately 25 hours. However, in its internal review the Council found that this was a conservative estimate.

20. It explained that negotiations with the developers about Keybridge House were extensive and involved many different officers of the Council. These included officers in Development Management, Planning Policy, Design, Housing, Transport, Street Care and Regulatory Service. From this analysis, the Council considered that the number of emails that would need to be identified, located and extracted to respond to the requests would likely exceed the 1500 originally estimated. The Council did not go on to assess requests 3) and 4) individually but rather concluded that the combined effect of dealing with the requests would place a disproportionate strain on the Council's resources.

21. As stated, it is the Commissioner's view that regulation 12(4)(b) can be applied where compliance with a request would mean a public authority had to bear an unreasonable level of costs and, or it involved an unreasonable diversion of resources. An estimate that compliance would exceed the appropriate limit may provide support for a public authority's claim that a request is manifestly unreasonable. However, the Fees Regulations are not in any way determinative on whether a request is 'manifestly unreasonable' rather than just, say, 'unreasonable'. To therefore test whether the exception applies to each of the requests, the

Commissioner has found it necessary to consider the following matters: 1) whether the Council was entitled to consider the requests together when ascertaining whether the burden of compliance was manifestly unreasonable; and 2) the quality of the estimate itself. These are addressed in turn.

22. In the last of the bullet points set out above, it is acknowledged that a public authority may take into account other requests made by the same applicant when considering the burden that complying with a request may impose. In this case the Council's position is that requests 2, 3 and 4 should be considered collectively when assessing the level of burden; finding that once it had been established that request 2 engaged regulation 12(4)(b) it followed that the remaining requests would be covered by the exception.

23. Again, unlike FOIA there is no specific provision within the EIR for the aggregation of substantially similar requests. However, the Commissioner accepts there may be occasions when it would be appropriate to consider a number of requests together when deciding if they are manifestly unreasonable on the grounds of cost. Making a comparison with FOIA, the Fees Regulations state that two or more requests can be aggregated when (a) they are made by one person or by different persons who are acting in concert; (b) they relate, to any extent, to the same or similar information; and (c) those requests are received by the public authority within any period of sixty consecutive working days. The Commissioner has found this to be a useful guide when deciding whether the Council correctly aggregated the requests for the purposes of regulation 12(4)(b).

24. It is evident that the requests in this case would satisfy conditions (a) and (c) of the aggregation conditions, being made by the same applicant within the specified time period. However, the case for (b) is less made out.

25. In his guidance 'Requests where the cost of compliance with a request exceeds the appropriate limit'[2], the Commissioner looks in more detail at each of the aggregation conditions set out in the Fees Regulations. With regard to (b), which refers to the necessity that the requests being aggregated relate to the 'same or similar information', the Commissioner considers this is quite a wide test. This is because the Fees Regulations require that the requests which are to be aggregated relate "to any

[2] https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

extent" to the same or similar information. The Commissioner goes on to say that requests are likely to relate to the same or similar information where, for example, the requestor has expressly linked the requests or whether there is an overarching theme or common thread running between the requests in terms of the nature of the information that has been requested.

26. It is evident that requests 3) and 4) both share an overarching theme, namely the disposal of land at Kennington Park and Kennington Green. On the basis that conditions (a) – (c) are met, the Commissioner considers it was appropriate for the Council to consider the two requests together. However, the Commissioner does not accept that this overarching theme or common thread extends to request 2).

27. In forming this view, the Commissioner has borne in mind the breadth of the test in condition (b). Fundamentally, however, the development of Keybridge House, the subject of request 2, and the disposal of land at Kennington Park and Kennington Green, the subject of requests 3 and 4, are not dependent on each other or linked to any extent beyond the involvement of the Council in each case. Accordingly, it is the Commissioner's judgement that the Council was not entitled to consider requests 3) and 4) alongside request 2) when considering the burden of complying with the requests.

28. The Commissioner's next step is therefore to establish whether the Council has adequately demonstrated that regulation 12(4)(b) is engaged in respect of request 2) and, or requests 3) and 4). In the Commissioner's view, it has not.

29. With regard to requests 3) and 4), the Commissioner instinctively considers that the requests could cover a significant amount of information. Projects of the type referred to in the request, which concerns the transfer of land by a public authority to another, will invariably involve extensive discussions and correspondence because of the complexity of the technical and legal issues needing to be settled. However, this recognition in itself is not sufficient to find that a request is manifestly unreasonable. Instead, any public authority seeking to apply regulation 12(4)(b) on the basis of burden must be able to demonstrate not only that it has solid grounds for finding that complying with the request would be disproportionately burdensome but also that it has considered the other relevant factors referred to above, such as the value of the information being requested.

30. In this case the Commissioner accepts that the local population would benefit from knowing more about the way that the Council managed its assets. This would therefore lend weight to the position that the requests should not be considered 'manifestly unreasonable', even

assuming they could be considered 'unreasonable' because of the burden of compliance. It is therefore for the Council to show that the wider value of the information did not justify the level of resources that would need to be expended on complying with the requests. The Council has patently failed to do this despite repeated opportunities and invitations. The Commissioner has therefore decided that requests 3) and 4) do not engage the exception.

31. The Commissioner has next considered the application of regulation 12(4)(b) to request 2). Like the other requests, the Commissioner considers that the wide scope of the request increases the likelihood that a significant amount of material could be covered. This is borne out by the Council's description of the departments it would need to contact about the request and the number of emails, in excess of 1500, that potentially would need to be considered.

32. When considering the cogency of the submissions, the Commissioner has found the following important. Firstly, the Council has calculated that it would require one minute per document to '*assess each of the 1,500 emails and identify whether the information is within this part'* of the request. With regard to the need to 'identify' relevant information, the Council has not explained what this activity would entail.

33. Returning to the terms of the request itself, the Commissioner notes that the complainant has asked for *"records of meetings, discussion, and all email"* that has passed between the Council and the proposed developer relating to the development of Keybridge House. Significantly, the request does not limit itself to any category of information about the development but simply asks for copies of the relevant records that are on that subject. In the Commissioner's view, it should then be a relatively easy process to narrow down a search for correspondence of this description by focusing on the parties at the relevant developer that had sent or received correspondence. Once a comprehensive list of the correspondence had been compiled, it should be a straightforward process to ascertain whether a particular item concerned the development at Keybridge House. For example, the title of an email may give this information away in many cases.

34. Bearing in mind the terms of the request, the Council has not explained why a more detailed interrogation of the contents of the information itself would be required in order to identify whether the information fell within scope. The Commissioner therefore considers that the Council has failed to support as reasonable its view that it would require a full minute per document to confirm whether that document was relevant to the request.

35. Secondly, even it is allowed that a reasonable estimate for compliance would exceed the 18 hour appropriate limit, it does not automatically follow that the request is manifestly unreasonable for the purposes of the EIR. While the Commissioner considers that the presented estimate for compliance is sizeable it is not so large as to automatically classify the request as being manifestly unreasonable. In this situation a public authority must go on to test whether any disruption caused by complying with the request is offset by the importance of the issue to which the information relates and the extent to which the information would shed light on that particular matter.

36. While the development of Keybridge House is essentially a local issue, and therefore the wider value of the information could be assumed to be fairly limited, it is nevertheless true that the decision-making regarding the development is considered important. Keybridge House, an example of brutalist architecture, occupies a prime site and in January 2014 BT, the owner, won planning permission from the Council to demolish the building and replace it with a mixed-use scheme. The plans included new homes, a primary school and office space. However, the proposal is not universally lauded. For example the Vauxhall Society, a civic consultative group for the constituency of Vauxhall, criticised the Council in December 2013[3] for failing to ensure that the plans adhered to its Local Development Framework Core Strategy, which requires the Council to 'develop and sustain stable neighbourhoods.' The Vauxhall Society explained the deal would mean that BT delivered 'as little as 2.4% of the proposed dwellings on the site as 'affordable', not Lambeth policy of 40%.'

37. Accordingly, there is no doubt that the issue is significant and certainly not trivial. Regarding the extent to which the information would illuminate the issue, the Commissioner considers that the generality of the request – which simply asks for all correspondence rather than specific information relating to the development – dilutes its usefulness as a tool for holding the Council to account. However, insofar as the information would make transparent the relationship between the Council and a developer, the information would still have value.

38. The Commissioner considers that the Council has provided little or no evidence that it has considered the wider circumstances in which the request was made and the significance of the issue. Instead, it has principally relied on its estimate as a ground for finding that regulation

[3] http://www.vauxhallcivicsociety.org.uk/2013/12/its-time-to-park-this-keybridge-house-development-the-vauxhall-society/

12(4)(b) is engaged. Any request that would require a public authority to commit to work that goes beyond the appropriate limit may potentially be deemed unreasonable. However, the test of whether regulation 12(4)(b) of the EIR applies is more stringent than the test of whether section 12 in FOIA applies and among the wider considerations a public authority must take account of the EIR's express presumption in favour of disclosure.

39. Returning to the explanation of 'manifestly unreasonable' set out earlier in the notice, the Commissioner considers the Council has not demonstrated that there is an obvious or tangible quality to the unreasonableness. For this reason the Commissioner has decided that regulation 12(4)(b) of the EIR is not engaged, meaning he has not had to go on to consider the public interest test.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

    First-tier Tribunal (Information Rights)
    GRC & GRP Tribunals,
    PO Box 9300,
    LEICESTER,
    LE1 8DJ

    Tel: 0300 1234504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed ……

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF